



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94089; File No. SR-EMERALD-2021-42]

Self-Regulatory Organizations; MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the MIAX Emerald Fee Schedule to Adopt a Tiered Pricing Structure for Certain Connectivity Fees

January 27, 2022.

I. Introduction

On December 1, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change (File Number SR-EMERALD-2021-42) to amend the Exchange’s Fee Schedule (“Fee Schedule”) to adopt a tiered pricing structure for certain connectivity fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the Federal Register on December 20, 2021.⁴ Under Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) temporarily suspending File Number SR-EMERALD-2021-42; and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ See Securities Exchange Act Release No. 93776 (December 14, 2021), 86 FR 71983 (“Notice”).

⁵ 15 U.S.C. 78s(b)(3)(C).

(ii) instituting proceedings to determine whether to approve or disapprove File Number SR-EMERALD-2021-42.

II. Background and Description of the Proposed Rule Change

MIAX Emerald has a connectivity infrastructure that permits Members and non-Members to connect directly to the Exchange, and access the Exchange's trading platforms, market data systems, test systems, and disaster recovery facilities.⁶ Prior to implementation of the proposed rule change, a market participant connecting to the primary or secondary facility of the Exchange options platform via a 10 gigabit ultra-low latency ("10Gb ULL") fiber connection was assessed a monthly fee of \$10,000 per connection.⁷ The Exchange proposes to modify the Fee Schedule to adopt a tiered pricing structure for 10Gb ULL fiber connections as follows:

- \$9,000 each for the 1st and 2nd 10Gb ULL connections;
- \$11,000 each for the 3rd and 4th 10Gb ULL connections; and
- \$13,000 for each additional connection 10Gb ULL connection.⁸

These fees (the "Proposed Access Fees") are assessed in any month the Member or non-Member is credentialed to use any of the Exchange's APIs or market data feeds in the Exchange's

⁶ See Notice, supra note 4 at 71984.

⁷ See id. 1Gb connections to the primary/secondary facility, and 1Gb and 10Gb connections to the disaster recovery facility are subject to separate monthly charges that are not affected by the proposed rule changes.

⁸ The Exchange initially filed the proposed fee change on July 30, 2021. See Securities Exchange Act Release No. 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR-EMERALD-2021-23). That filing was withdrawn by the Exchange. The Exchange filed new proposed fee changes with additional justification (SR-EMERALD-2021-29), which were the subject of a Suspension of and Order Instituting Proceedings. See Securities Exchange Act Release No. 93644 (November 22, 2021), 86 FR 67750 (November 29, 2021). The Exchange subsequently withdrew that filing and replaced it with the instant filing to provide additional information and a revised justification for the proposal, which is discussed herein. See Securities Exchange Act Release No. 93736 (December 7, 2021), 86 FR 70878 (December 13, 2021) (Notice of Withdrawal); see also Notice, supra note 4 at 71984.

production environment, pro-rated when a Member or non-Member adds or deletes a connection.⁹

III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,¹⁰ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹¹ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange argues that the proposed tiered pricing structure for 10Gb ULL connections is reasonable, equitable, and not unfairly discriminatory because the new tiers result in a majority of 10Gb ULL purchasers either saving money or paying the same amount.¹² As discussed further below, the Exchange states that “a higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections.”¹³ The Exchange also maintains that the tiered pricing structure will encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and should

⁹ See Notice, supra note 4, at 71985. The Exchange state that it deems connectivity fees to be access fees, and records these fees as part of its “Access Fees” revenue in its financial statements. Id. at 71985.

¹⁰ 15 U.S.C. 78s(b)(3)(C).

¹¹ 15 U.S.C. 78s(b)(1).

¹² See Notice, supra note 4, at 71990. The Exchange states that approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 40% of firms experienced an increase in their monthly connectivity fees. See id. at 71991.

¹³ See id.

better enable the Exchange to monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.¹⁴

In further support of the proposal, the Exchange argues that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing the associated services and will not result in the Exchange generating a supra-competitive profit.¹⁵ Specifically, the Exchange states that the Proposed Access Fees are based on a "cost-plus model," designed to result in "cost recovery plus present the possibility of a reasonable return."¹⁶ According to the Exchange, employing a "conservative methodology" that "strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity," it estimates the total projected 2021 cost to offer 10Gb ULL connections at \$7.2 million, representing \$1.7 million in third-party cost and \$5.5 million in internal cost.¹⁷ To arrive at these figures, the Exchange states that it undertook a thorough internal analysis of nearly every expense on each Exchange's general expense ledger to determine whether each such expense related to the Proposed Access Fees, and, if such expense did so relate, to determine what portion (or percentage) of such expense supported the access services.¹⁸ The Exchange states that this process entailed discussions with each Exchange department head to identify the expenses that support the access services associated with the Proposed Access Fees, review of the expenses holistically on an Exchange-wide level with assistance from the internal finance department, and then assessment of the total expense, with no expense allocated twice.¹⁹

¹⁴ See Notice, supra note 4, at 71992.

¹⁵ See id. at 71985, 71987.

¹⁶ See id. at 71986.

¹⁷ See id. at 71986, 71987, 71988, 71989. The 2021 costs are projected because the Exchange's most recent Audited Unconsolidated Financial Statement is for 2020, with projections utilizing the same presentation methodology as used in their previously-filed Audited Financial Statements. See id. at 71986.

¹⁸ See id. at 71986.

¹⁹ See id. at 71987. The Exchange also states that the \$7.2 million in expense is "directly related to the access services associated with the Proposed Access Fees, and not any other

The Exchange states that the \$1.7 million projected 2021 third-party expense is the sum of fees paid to: (1) Equinix, for data center services (approximately 62% of the Exchange's total applicable Equinix expense); (2) Zayo Group Holdings, Inc. for network services (approximately 62%); (3) various other services providers, including "Secure Financial Transaction Infrastructure" ("SFTI") (approximately 89%); and (4) various other hardware and software providers (approximately 51%).²⁰ Likewise, the Exchange states that the \$5.5 million projected 2021 internal expense, is the sum of: (1) employee compensation and benefits expense allocated to the Proposed Access Fees (\$3.2 million, which is 33% of the total projected expense of \$9.7 million for employee compensation and benefits);²¹ (2) depreciation and amortization expense allocated to the Proposed Access Fees (\$2 million, which the Exchange estimated as 63% of the total projected expense of \$3.1 million for depreciation and amortization); and (3) occupancy expense (\$0.3 million, which the Exchange estimated as 53% of the Exchange's total projected expense of \$0.5 million for occupancy). Converting the projected annualized expense figure to a monthly figure, the Exchange estimates an average monthly cost of offering the services associated with the Proposed Access Fees at \$600,000.²²

Regarding revenue, the Exchange represents that revenue for the month of October 2021 was approximately \$1,146,714 (including pro-rated charges), attributable to the purchase of 100 10Gb ULL connections at the proposed tiered rates. Accordingly, the Exchange calculated a

product or service offered by the Exchange, and does not include general costs of operating matching engines and other trading technology. Id. at 71987.

²⁰ See id. at 71988-99.

²¹ For employee compensation and benefit costs, for example, the Exchange included the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). See id. at 71989.

²² See id. at 71990.

\$546,714 monthly profit for October 2021 and a profit margin of 47%. As a baseline, the Exchange used revenue for July 2021 before introduction of the Proposed Access Fees, which it represented was \$971,905, attributable to the purchases of a total of 98 10Gb ULL connections, to calculate the baseline monthly profit margin of 38%.

The Exchange maintains that a 9% profit margin increase from July 2021 (before introduction of the Proposed Access Fees) to October 2021 (after the introduction of the Proposed Access Fees) is reasonable.²³ The Exchange also argues that a 47% rate of return is reasonable because it will allow them to “to continue to recoup its expenses and continue to invest in its technology infrastructure.”²⁴ The Exchange adds that this profit margin does not take into account: (i) fluctuations in revenue as a result of Members and non-Members adding and dropping connections at any time based on their own business decisions, which they frequently do; (ii) future price increases from third parties; and (iv) inflationary pressure on capital items that it needs to purchase to maintain the Exchange’s technology and systems, which have resulted in price increases upwards of 30% on network equipment due to supply chain shortages, and in turn result in higher overall costs associated with ongoing system maintenance.²⁵ In addition, although the Exchange does not assert that competitive forces constrain the Proposed Access Fees, it maintains that the Proposed Access Fees are reasonable when compared to the fees of other options exchanges, as the Exchange’s proposed fees for 10Gb ULL connections even at the proposed highest tier are lower than those of other options exchanges with similar market share.²⁶

²³ See id.

²⁴ Id.

²⁵ Id. at 71986-87 and 71990.

²⁶ Id. at 71992. The Exchange asserts that when compared to fees charged by and market shares (for the month of November 2021, as of November 26, 2021) for The NASDAQ Stock Market LLC (“Nasdaq”), Nasdaq ISE LLC (“ISE”), Nasdaq PHLX LLC (“Phlx”), and NYSE American LLC, the Exchange’s proposed tiered pricing structure is “significantly lower” than these competing options exchanges with similar market share.

As noted above, the Exchange also argues that the tiered structure of the Proposed Access Fees results in an equitable allocation of fees that are not unfairly discriminatory, noting that after implementation of the Proposed Access Fees, a majority of 10Gb ULL purchasers either were saving money or paying the same amount.²⁷ The Exchange further explains that firms that primarily route orders for best execution generally only need a limited number of connections to fulfill that obligation and connectivity costs will likely to be lower for these firms.²⁸ Addressing the fee increases experienced by some 10Gb ULL purchasers, the Exchange urges that the increases for these firms are justified because the new fees “apply to all Members and non-Members in the same manner based on the amount of 10Gb ULL connectivity they require based on their own business decisions and usage of Exchange resources.”²⁹ The Exchange explains that the firms experiencing higher fees are those engaged in advanced trading strategies that typically require multiple connections and generate higher costs for the Exchange by utilizing more of the Exchange’s resources.³⁰ Responding to prior comment that the Exchange had not demonstrated that a firm purchasing more than two or four 10Gb ULL connections would use Exchange resources at a greater rate per connection than those purchasing fewer, the Exchange states that “more connections purchased by a firm likely results in greater expenditure of Exchange resources and increased cost to the Exchange.”³¹ The Exchange describes firms that

Id. For example, the Exchange states that the affiliated exchanges Nasdaq, ISE and Phlx charge a monthly fee of \$10,000 per 10Gb fiber connection and \$15,000 per 10Gb Ultra fiber connection, while the highest tier of the Exchange’s proposed fee structure is \$2,000 less per month. Id.

²⁷ See id. at 71991. The Exchange state that approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 40% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered pricing structure when compared to the flat monthly fee structure. See id.

²⁸ See id. at 71991.

²⁹ See id.

³⁰ See id.

³¹ See id.

primarily route orders seeking best-execution and purchase only a limited number of connections as those that “also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.”³² In contrast the Exchange describes firms that purchase more than two to four 10Gb ULL connections as those that “essentially do so for competitive reasons amongst themselves and choose to utilize numerous connections based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency.”³³ According to the Exchange, these firms are generally engaged in sending liquidity-removing orders to the Exchange and seek to add more connections so they can access resting liquidity ahead of their competitors, and this type of usage of the 10Gb ULL connections is more costly to the Exchange, as a result of, among other things, frequently adding and dropping connections mid-month to determine which connections have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center which results in “disproportionate pull on Exchange resources to provide the additional connectivity.”³⁴

To date, the Commission has not received any comment letters on the revised justifications for the Proposed Access Fees.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.³⁵ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”³⁶

³² See id.

³³ See id.

³⁴ See id. at 71991-92.

³⁵ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

³⁶ Id.

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;³⁷ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;³⁸ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.³⁹

In temporarily suspending the Exchange's fee changes, the Commission intends to further consider whether the proposals to modify fees for certain connectivity options and implement a tiered pricing fee structure is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁴⁰

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.⁴¹

³⁷ 15 U.S.C. 78f(b)(4).

³⁸ 15 U.S.C. 78f(b)(5).

³⁹ 15 U.S.C. 78f(b)(8).

⁴⁰ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁴¹ For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)⁴² and 19(b)(2)(B)⁴³ of the Act to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,⁴⁴ the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchange has sufficiently demonstrated how the proposed rule change is consistent with Sections 6(b)(4),⁴⁵ 6(b)(5),⁴⁶ and 6(b)(8)⁴⁷ of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among

⁴² 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

⁴³ 15 U.S.C. 78s(b)(2)(B).

⁴⁴ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

⁴⁵ 15 U.S.C. 78f(b)(4).

⁴⁶ 15 U.S.C. 78f(b)(5).

⁴⁷ 15 U.S.C. 78f(b)(8).

its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following aspects of the proposals and asks commenters to submit data where appropriate to support their views:

1. Cost Estimates and Allocation. The Exchange states that it is not asserting that the Proposed Access Fee are constrained by competitive forces, but rather sets forth a "cost-plus model," employing a "conservative methodology" that "strictly considers only those costs that are most clearly directly related to the provision and maintenance of 10Gb ULL connectivity to estimate such costs."⁴⁸ Setting forth its costs in providing 10Gb ULL connectivity, and as summarized in greater detail above, the Exchange projects \$7.2 million in aggregate annual estimated costs for 2021 as the sum of: (1) \$1.7 million in third-party expenses paid in total to Equinix (62% of the total applicable expense) for data center services; Zayo Group Holdings, for network services (62% of the total applicable expense); SFTI for connectivity support, Thompson Reuters, NYSE, Nasdaq, and Internap and others (89% of the

⁴⁸ See Notice, supra note 4, at 71986 and n.28.

total applicable expense) for content, connectivity services, and infrastructure services; and various other hardware and software providers (51% of the total applicable expense) supporting the production environment, and (2) \$5.5 million in internal expenses, allocated to (a) employee compensation and benefit costs (\$3.2 million, approximately 33% of the Exchange's total applicable employee compensation and benefits expense); (b) depreciation and amortization (\$2 million, approximately 63% of the Exchange's total applicable depreciation and amortization expense); and (c) occupancy costs (\$0.3 million, approximately 53% of the Exchange's total applicable occupancy expense). Do commenters believe that the Exchange has provided sufficient detail about how it determined which costs are most clearly directly associated with providing and maintaining 10Gb ULL connectivity? The Exchange describes a process involving all Exchange department heads, including the finance department, but do not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee compensation and benefit costs, for example, the Exchange calculated an allocation of employee time in several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development, Trade Operations, Finance, and Legal, but did not provide the job titles and salaries of persons whose time was accounted for, or explain the methodology used to determine how much of an employee's time is devoted to that specific activity. What are commenters' views on whether the Exchange has provided sufficient detail on the identity and nature of services provided by third parties? Across all of the Exchange's projected costs, what are commenters' views on whether the Exchange has provided sufficient detail on the elements that go into connectivity costs, including how shared costs are allocated and attributed to connectivity expenses, to permit an independent review and assessment

of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchange be required to identify for what services or fees the remaining percentage of un-allocated expenses are attributable to (e.g., what services or fees are associated with the 37% of applicable depreciation and amortization expenses the Exchange does not allocate to the Proposed Access Fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of estimated costs?

2. Revenue Estimates and Profit Margin Range. The Exchange provides a single monthly revenue figure as the basis for calculating the profit margin of 47%. Do commenters believe this is reasonable? If not, why not? The Exchange states that their proposed fee structure is “designed to cover its costs with a limited return in excess of such costs,” and believes that a 47% margin is such a limited return over such costs.⁴⁹ The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchange acknowledges that this margin may fluctuate from month to month due to changes in the number of connections purchased, and that costs may increase.⁵⁰ The Exchange does not account for the possibility of cost decreases, however. What are commenters’ views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchange’s methodology for estimating the profit

⁴⁹ See Notice, supra note 4, at 71986, 71990.

⁵⁰ See id.

margin is reasonable? Should the Exchange provide a range of profit margins that it believes are reasonably possible, and the reasons therefor?

3. Reasonable Rate of Return. Do commenters agree with the Exchange that its expected 47% profit margin would constitute a reasonable rate of return over cost for 10GB ULL connectivity? If not, what would commenters consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? What are commenters' views regarding what factors should be considered in determining what constitutes a reasonable rate of return for 10Gb ULL connectivity fees? Do commenters believe it relevant to an assessment of reasonableness that the Exchange's proposed fees for 10Gb ULL connections, even at the highest tier, are lower than those of other options exchanges to which the Exchange has compared the Proposed Access Fees? What are commenters' views regarding the difference in profit margins between the Exchange, at 47%, and that of its affiliates (MIAX and PEARL Options), at 21.3%? Do commenters believe that this profit margin difference between affiliates for the same Proposed Access Fees is appropriate given the Exchange's Proposed Access Fees are not for shared 10Gb ULL connectivity; why or why not? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?
4. Periodic Reevaluation. The Exchange has not addressed whether it believes a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly. In light of the impact that the number of subscribers has on connectivity profit margins, and the potential for costs to decrease (or increase) over time, what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that they stay in line

with their stated profitability target and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its subscriber estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

5. Tiered Structure for 10Gb ULL Connections. The Exchange states that the proposed tiered fee structure is designed to decrease the monthly fees for those firms that connect to the Exchange as part of their best execution obligations and generally tend to send the least amount of orders and messages over those connections, because such firms generally only purchase a limited number of connections, and also “generally send less orders and messages over those connections, resulting in less strain on Exchange resources.”⁵¹ According to the Exchange, 60% of firms have not experienced a fee increase as a result of the tiered structure. However, firms that purchase five or more connections will see a 30% increase in their fees for each connection above the fourth. Regarding these firms, the Exchange has not asserted that it is 30% more costly for the Exchange to offer such connections to these firms, but instead argue generally that these firms are “likely” to result in greater expenditure of Exchange resources and increased cost to the Exchange.⁵² Do commenters believe that the price differences between the tiers are supported by the Exchange’s assertion that it set the level of its proposed fees in a manner that it is

⁵¹ See Notice, supra note 4, at 71991.

⁵² See id.

equitable and not unfairly discriminatory? Do commenters believe the Exchange should demonstrate how the proposed tiered fee levels correlate with tiered costs (e.g., by providing cost information broken down by tier, messaging and order volumes through the additional 10Gb ULL connections by tier, and/or mid-month add/drop of connection rates by tier)? Do commenters believe that the Exchange should provide more detail about the costs that firms purchasing three or more or five or more 10Gb ULL connections impose on the Exchange, to permit an assessment of the Exchange’s statement that the Proposed Access Fees “do not depend on any distinctions between Members, customers, broker-dealers, or any other entity, because they are solely determined by the individual Member’s or non-Member’s business needs and its impact on the Exchange resources?”⁵³

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”⁵⁴ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁵⁵ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁵⁶ Moreover, “unquestioning reliance” on an SRO’s representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.⁵⁷

⁵³ See id.

⁵⁴ 17 CFR 201.700(b)(3).

⁵⁵ See id.

⁵⁶ See id.

⁵⁷ See Susquehanna Int’l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 446-47 (D.C. Cir. 2017) (rejecting the Commission’s reliance on an SRO’s own determinations without sufficient evidence of the basis for such determinations).

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, any potential comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission.

V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁸

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

⁵⁸ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-EMERALD-2021-42 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-EMERALD-2021-42. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filings also will be available for inspection and copying at the principal office of each Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EMERALD-2021-42 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁵⁹ that File Number SR-EMERALD-2021-42 be, and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁰

J. Matthew DeLesDernier,

Assistant Secretary.

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⁵⁹ 15 U.S.C. 78s(b)(3)(C).

⁶⁰ 17 CFR 200.30-3(a)(57) and (58).